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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1952

No. 107

SINCLAIR REFINING COMPANY,
a Maine corporation,
*Petitioner,*
vs.
WALTER GUTOWSKI,
*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Sinclair Refining Company, a Maine corporation, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit rendered April 3, 1952, affirming a final decree of the United States District Court for the Eastern District

of Michigan, Southern Division, filed April 3, 1952 (R. 169).

## JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered April 3, 1952 (R. 169). An order signed by Justice Simons was made by that Court staying execution on the mandate until June 8, 1952, pending the filing of this petition for certiorari.

The Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

The jurisdiction of this Court is invoked to determine whether the District Court and Court of Appeals were bound to apply the substantive law of the State of Michigan, and further, to determine the scope of Rule 15(b) of the Federal Rules of Civil Procedure as it applies to this cause.

## QUESTIONS PRESENTED

I. A legal question presented is whether the District Court and the Court of Appeals were bound to apply the substantive law of the State of Michigan which has been resolved with respect to:

(a) Whether a purported oral lease of petitioner's premises made on May 23, 1949, by which the lessee was entitled to possession from prior to July 31, 1949, to August 1, 1950, is contrary to the Statute of Frauds of the State of Michigan?

(b) Whether an acknowledged notice of limitation on the scope of agents' authority to the making of written leases should have prevented recovery on the theory of an oral lease under law of the State of Michigan?

(c) Whether the allowance of damages for loss of prospective profits as to an alleged lease of premises at which the alleged lessee has never operated a business was erroneous under law of the State of Michigan as being too remote and speculative?

II. A legal question is presented as to whether Rule No. 15(b) of the Federal Rules of Civil Procedure permits recovery on a theory which (a) was not pleaded, (b) to which objection was made when the theory was suggested by the Court, and (c) as to which theory, after such objection, the respondent has failed to move to amend at any time in order to incorporate the same in this case.

## STATEMENT OF THE MATTER INVOLVED

This is a suit for breach of a written lease, and in the alternative for breach of an oral lease of a service station then in the process of being built by the Petitioner. Recovery on the theory of a written lease has been denied both in the District Court and in the Court of Appeals, for the reason that the Petitioner never executed the writing involved. The Petitioner denied both the existence of an oral lease and the authority of its agents to enter into an oral lease. It further denied liability for damages which represented the loss to Respondent for prospective profits in a new location.

The District Court and the Court of Appeals both found that the Petitioner, through its agents, entered into an oral lease and that the Petitioner's agents had the apparent authority to enter into such an oral lease. For this reason and for the sake of brevity the factual situation with respect to agency will be here limited to those negotiations surrounding the limiting of the authority of the agents, which Petitioner contends precludes, under Michigan law, any finding that the agents had any apparent authority to enter into an oral contract and which Petitioner further contends should have been the subject of a charge to the Jury.

The lease form, which was signed by Respondent but not signed by Petitioner, contained the following paragraph No. 22:

> "• • • Lessee acknowledges notice that this instrument may be executed on Lessor's behalf only by one of its officers or managers and that none other has authority to consent or agree to any alteration, amendment, modification or limitation whatsoever of the terms of this lease. This lease shall not be binding upon Lessor until executed on its behalf notwithstanding any delivery of possession to, or the acceptance of rent from, Lessee."

The Respondent testified with respect to the lease as follows:

> "Q. What was the next thing you heard about the station?
>
> A. When they called me up and asked me to come down; I believe that was on the twenty-third of May, *to sign the lease.*" (Italics ours.)
>
> • • • • •
>
> "Q. And were you shown some papers that you were asked to sign?
>
> A. Yes, sir." (Italics ours.) (R. 36, 37 and 38).

The Petitioner in the lower courts at all times denied that there was any authority to bind the Petitioner to a lease agreement other than in accordance with paragraph 22 of the lease, specifically that it must be in writing and executed by either the Petitioner's Area Manager or one of its officers. The Respondent knew on the date he signed the lease that Mr. C. M. Cocanougher was the Petitioner's Area Manager, the only person in the area concerned designated in paragraph No. 22 as having power to sign the lease form (R. 43). There is no testimony that Petitioner did not intend to rely on the provisions of paragraph 22 or that Petitioner was estopped or had waived its rights to rely thereon.

The Respondent's testimony fails to show that he made inquiry of any one as to whether or not Mr. Cocanougher had authority to bind the Petitioner to an oral lease agreement even after the Respondent acknowledged notice (by signing the lease form) that the only authority he had to bind Petitioner to the lease agreement form in question was by executing on its behalf the lease agreement form which Respondent had previously signed. The Respondent never inquired as to whether Mr. Cocanougher had executed the lease for the Petitioner.

The Petitioner at all times relied on the provisions of paragraph 22 for the sole purpose of limiting the authority of its agents and under Michigan Law it was entitled to so do.

The Petitioner has at all times contended that it was entitled to rely on the Law of the State of Michigan and the acknowledgment Respondent made by signing its lease agreement created in Petitioner certain irrefragable rights, one of which was the right to rely upon all terms of its

contract by which Respondent had agreed to be bound unless Respondent could show why as a matter of law he should not be so bound.

The Petitioner has at all times contended that there was nothing more it could have done to limit leasing authority to one agent in an area and to limit that agent's authority to the signing of written leases.

The Petitioner has at all times contended that there was nothing more it could have done to avoid being bound on purported oral lease agreements.

To Petitioner this question is one of general public importance in that corporations, in reliance upon the Law of the State and rights created by contract, under such a rule as was made in the Court below would be deprived of one of the few ways (ways which have been condoned by the Courts of the States) they have of limiting the authority of their agents.

The District Court, in its charge to the jury concerning the agency relationship, charged with respect to the apparent authority of agents but refused to charge as to the effect of notice of limitation thereon.

The Petitioner requested the District Court, in keeping with the established law of the State of Michigan, to charge as follows:

> "1. I charge you that the apparent power of an agent is to be determined by the acts of the principal, and not by the acts of the agent. (*Weirman v. Bay City Michigan Sugar Company*, 142 Mich. 422).
>
> "As applied to this case, the only notice by the defendant as to the power of the defendant's agents

to bind the company to lease agreements is contained in Paragraph 22 of Exhibit 5:

> 'Lessee acknowledges notice that this instrument may be executed on Lessor's behalf only by one of its officers or managers and that none other has authority to consent or agree to any alteration, amendment, modification or limitation whatsoever of the terms of this lease. This lease shall not be binding upon Lessor until executed on its behalf, nothwithstanding any delivery of possession to, or the acceptance of rent from, Lessee.' "

The plaintiff acknowledged notice of this limitation when he signed Exhibit 5 (R. 38) on May 23, 1949.

> "Further, the only person with any authority under Paragraph 22 to make lease agreements (in addition to officers who are not involved in this suit) was C. M. Cocanougher, the defendant's area manager. Therefore, in determining whether or not there was a lease between the parties, you are to disregard entirely any and all acts and statements of Mr. Hampton and William C. Hartmann, for there is no evidence whatsoever that either Mr. Hampton or Mr. Hartmann had any authority, either actual or implied, to bind the defendant to lease agreements.
>
> "Now as to acts of conduct of C. M. Cocanougher, the defendant's area manager, the only testimony is that: after the plaintiff signed Exhibit 5, Mr. Hartmann took the plaintiff to Mr. Cocanougher who said that he was glad to have the plaintiff as a dealer and knew the plaintiff would do well due to his experience (Transcript, page 43); further, that Mr. Cocanougher was present when the plaintiff declined to sell defendant's products in another filling station (Transcript, page

72). I charge you that the conduct of C. M. Cocanougher is not sufficient to overcome the limitation on his authority, contained in Paragraph 22, to the binding of the defendant to leases only by the execution of written lease agreement. (*Hall v. Encyclopedia Britannica, Inc.*, 325 Mich. 35).

"2. I charge you that by reason of such limitation of authority in Paragraph 22, the plaintiff had no right to rely on any of defendant's claimed conduct in assuming that there was a lease, particularly in view of the lack of any testimony that the plaintiff made any inquiry as to the authority of those with whom he claimed to have dealt or any inquiry as to whether or not the lease was executed by the defendant.

"4. I charge you that the plaintiff cannot recover on the theory of an oral lease for several reasons:

"First of all, the plaintiff's only negotiations as to the terms of any lease were not with an agent who had any authority to bind the defendant to lease agreements."

Notice should also be taken that (R. 112-113) the Court when Mr. Hall, attorney for the Petitioner, was presenting to it the theory and decision in *Hall v. Encyclopedia Britannica, Inc.*, 325 Mich. 35, stated:

"Well, you may be absolutely right, so far as the law is concerned, but I have my doubts about it, because that which is unjust is usually unlawful, and it is obviously unjust to permit a corporation to operate in Michigan and mislead prospective customers like this, and then hide behind technicality.

"That is one of the reasons why corporations like the defendant corporation here stand in the bad

light that they do before the public, and I doubt whether the courts are going to continuously protect them in this kind of activity.

"So, for the present, I am going to hold that there is sufficient evidence that these people here were agents, so that if the jury so finds, I will at least pass that question."

In a further discussion of the same case, the District Court, in discussing its charge to the jury from the law of the case of *Hall v. Encyclopedia Britannica, Inc.*, 325 Mich. 35 (1949) said (R. 122):

"The Court: I think I can probably use part of *Hall v. Encyclopedia Britannica*, the case Mr. Hall cited. So that you may have this in mind in your argument to the jury, I may quote from that case as follows (reading):

'It is elementary that persons dealing with an agent may rely on his apparent authority, and that such authority is to be gathered from all of the facts and circumstances properly admitted in evidence.'"

As stated in that case, the quotation selected by the District Court was one on which the plaintiff relied in the Hall case. The Michigan Supreme Court opinion then went on to affirm a directed verdict for the defendant, citing as the Michigan rule:

"'If here is anything likely to put a reasonable businessman upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation.'"

In other words, the District Court used the quotation relied upon by the plaintiff in the Hall case, but refused to quote the rule on which the Michigan Supreme Court indicated it based its decision against that same plaintiff.

Respondent testified that on May 23, 1949, he obtained an oral agreement of lease pursuant to which he was entitled to possession shortly prior to July 31, 1949, and that the lease term was to end August 1, 1950 (R. 81).

The Petitioner requested the District Court to charge the jury in accordance with the Michigan Statute of Frauds:

> "4. I charge you that the plaintiff cannot recover on the theory of an oral lease for several reasons:
>
> Secondly, the plaintiff claims a right to possession from before July 31, 1949 to August 1, 1950. A lease for a period in excess of one year must be in writing and signed by the Lessor. (Mich. Comp. Laws 1929, Sec. 13,413; Mich. Stat. Ann., Sec. 26.908). The agreement alleged by the plaintiff to have been made on May 23, 1949 was for a lease period ending August 1, 1950; the part of the period after May 23, 1949 excluded in computing the period is that during which the plaintiff had no right to possession (111 A. L. R. 1466, including citation of Michigan cases at page 1467). (R. 127)."

The District Court refused to charge the jury in accordance therewith and, in effect, charged the jury that the Court recalled that the lease was to be for one year (R. 132). The Court failed to charge the established Michigan law that for the purpose of computing the term under the Statute of Frauds the term commences with the date on which the lessee is entitled to possession. The Court charged that the period was for one year and commenced

on August 1, 1949 (R. 132), although the Respondent testified that he was entitled to possession from before July 31, 1949 (R. 81).

The Court of Appeals, in passing on the Statute of Frauds, did not recognize that the Respondent's testimony that he was entitled to possession for more than one year barred recovery under the Michigan Statute of Frauds, and said:

> "Upon the finding of the jury that appellant executed an oral lease to apellee for the Sinclair Station appellant contends that it was barred by the Michigan Statute of Frauds. This is not correct. The allegation in the complaint and the evidence is that the lease was for a period of one year and it was, therefore, not barred. Michigan Stat. Ann., Sec. 26.908" (R. 174).

It is undisputed that the Respondent never at any time operated a business on these premises. The Petitioner requested the District Court in keeping with the established law of the State of Michigan, to charge as follows with respect to damages:

> "7. I charge you that any loss of prospective profits is not an element of damages in this case, for the reason that this was a new business and not an interruption of a previously operating business of the plaintiff at the location involved. (*Jarrait v. Peters,* 145 Mich. 29). Being a new business, any loss of profits necessarily would require speculation as to their amount.
>
> "8. I charge you that there is not sufficient evidence in this case to allow damages for the difference, if any, between actual rental value and the rent reserved under the lease. (*Jarrait v. Peters,* 145 Mich. 29.) The only available testimony is that of Mr. DeBoos and he was not asked, nor did he give, an opinion as to actual rental

value. There is no evidence, and there could be none, as to the amount of rent reserved under the lease, for that would require speculation as to the number of gallons which the plaintiff would have sold at the station involved if he had operated it. Even the plaintiff testified that he could not ascertain the amount of rent reserved in the lease (R. 82). The only opinion by Mr. DeBoos as to the market value of the lease was on the assumption that the station would be operated at a profit, which is speculation, further assuming that the lease would be continued beyond one year and that a new lessee would be acceptable to the defendant."

"9. I charge you that there is no measure of damages by any standard in this case. (*Shell Petroleum Corp. v. Ford,* 255 Mich. 105)."

The District Court refused to charge the jury in accordance with the foregoing requests. Petitioner believes this to amount to a failure to apply the established substantive law of the State of Michigan.

On appeal the Court of Appeals for the Sixth Circuit in passing upon the question of agency (R. 173) set forth all of the actions of Hampton, Hartmann and Cocanougher as establishing apparent authority but with respect to limited scope of the agency merely stated "appellant leans heavily upon the provision in the lease that it was not to become effective until it was signed by the District Manager, but this provision does not necessarily require a directed verdict in favor of appellant." The Court of Appeals cited no Michigan law to support this position. Petitioner has relied on Paragraph 22 throughout and has insisted that there has been no evidence to justify ignoring it.

The Circuit Court of Appeals for the Sixth Circuit with respect to the question of damages, in a business not operated by an alleged Lessee at the location concerned, applied only the case of *Marquette Cement Manufacturing*

*Co. v. Campbell Const. Co.*, 184 Fed. 2d 352, 354 C. A. 6, which was a case involving Arkansas law and in so doing held that:

> "Appellant contends that the judgment for $8,000.00 should be set aside because it represents the loss to appellee of prospective damages; that the Sinclair station was a new business, and that the profits therefrom to appellee would be too speculative. There was expert testimony to the effect that this amount would represent the minimum profit that would be realized. We cannot say that the amount so fixed was not the natural and probably consequences of the breach or within the reasonable contemplation of the parties. We find no reason for setting it aside or disturbing the discretion of the Court in sustaining it. See *Marquette Cement Mfg. Co. v. Campbell Const. Co.*, 184 Fed. (2d) 352, 354 CA 6" (R. 174-175).

In short, the Petitioner's position is that the District Court refused to charge the jury in accordance with established Michigan law as to (a) the effect of notice of limitation on the scope of agency authority, (b) the effect of a term of possession for more than one year as barring an oral lease under the Michigan Statute of Frauds, and, (c) the Michigan law as to recovery of loss of profits in a business never operated by the Respondent in that location.

The Court of Appeals cited no references to Michigan law, other than a statutory reference to the Michigan Statute of Frauds.

With respect to Rule 15(b) of the Federal Rules of Civil Procedure, an unpleaded theory was suggested by the Court during the trial:

> "The Court: Well, as I see the matter now, it is clear enough. What the plaintiff here claims is

> that the defendant failed to carry out an oral agreement to enter into a lease, and what I was trying to find out during th course of the trial here was what the terms of the lease were * * *
>
> "Now the plaintiff's claim is that the defendant, by these two men he talked to, was bound to enter into this lease, and that because of the breach of this oral agreement to grant the lease he suffered certain damages" (R. 54).

Petitioner at once objected to such proposed new theory:

> "Mr. Hall: On the first part of the Court's remarks, I have a general objection to recovery on the ground that the complaint does not in any way allege an agreement to make a lease, that is, the breach of an agreement to make a lease; but alleges only a written lease, and an oral lease" (R. 55).

The Respondent has not moved to amend his pleadings at any time to include the unpleaded theory of breach of an agreement to make a lease, after objection to the new theory was made.

With reference to the new theory, the Court of Appeals said:

> "Appellant then entered a general objection to recovery on the ground that the complaint did not allege an agreement to make a lease. Appellant (sic) took no further steps in this particular matter although the Court suggested that it might amend the complaint to conform to the proof. We think that this particular matter, if material, would be determined against defendant by Rule 15 (b) of the Federal Rules of Civil Procedure. See *American Fork & Hoe Co. v. Stampit Corp.*, 125 Fed. (2d) 472, 474 CCA; *Continental Illinois Nat. Bank & Trust Co. v. Ehrhart*, 127 Fed. (2d) 341, 343 CCA. But we think that it is not particularly important."

It appears that the two cases cited by the Court of Appeals involved new issues tried by consent. This case involves the question of a new theory to which objection was raised and as to which no motion to amend has been made. It appears that the quoted portion of the opinion of the Court of Appeals would permit litigants to rely on unpleaded theories, over objection, and without motion to amend to such new theories even after objection, and if the opinion is permitted to stand it likely will be cited to sustain such a position in future cases. Since this appears to enlarge Rule 15(b), even though it is not stated to be the sole basis of the opinion, a determination by this Court is requested as to whether the scope of Rule 15(b) should be so enlarged.

## REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. The discretionary power of this Court is invoked on the following ground: In refusing to apply the law as resolved and established by the decisions of the Courts of the State of Michigan, the District Court and the Court of Appeals for the Sixth Circuit have created a conflict and have decided important questions of local law in a way in conflict with applicable local decisions.

This conflict of decisions should be resolved by this Court.

Cases sustaining the granting of certiorari when there are conflicting decisions and Fedaral Courts have refused to apply local law and have decided important questions of substantive local law in a way in conflict with applicable local decisions are as follows: *Erie Railroad Co. v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 S. Ct. 817; *Moore v. Illinois Central Railroad Company*, 85 L. Ed. 1089, 61 S.

Ct. 754, 312 U. S. 630; *Texarkana v. Arkansas Louisiana Gas Co.*, 306 U. S. 188, 59 S. Ct. 448, 83 L. Ed. 599; *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 82 L. Ed. 1290, 58 S. Ct. 860; *Guaranty Trust Co. v. York*, 326 U. S. 99, 66 S. Ct. 7, 89 L. Ed. 2079; *Russell v. Todd*, 309 U. S. 293, 84 L. Ed. 762, 60 S. Ct. 527; *Six Companies of California v. Joint Highway District No. 13*, 311 U. S. 180.

II. A determination by this Court is requested as to whether or not Rule No. 15(b) of the Federal Rules of Civil Procedure permits recovery on a theory: (a) not pleaded, (b) to which objection was made when suggested by the Court and, (c) as to which theory, after such objection, the Respondent fails to move to amend at any time in order to incorporate the theory in the case.

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